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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 798

ROBERT E. BELL,

Petitioner,

vs.

THE BUCKEYE UNION CASUALTY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the District Court (Petitioner's Appendix of Record pp. 29 through 47) is appended to this Brief as *Appendix A* hereof.

JURISDICTION.

Supplementing the jurisdictional statement appearing in petition at page 1 thereof, it is noted that the time within which jurisdiction of this court must be invoked is prescribed in Rule 22(c) of this court, and Title 28 U. S. C. Sec. 2101(c) to be within 90 days after the entry of the judgment or decree to be reviewed.

The character of reasons which will be considered for invoking the jurisdiction of this court as prescribed by Rule 19(b) of this court, include (a) where a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter; and (b) has decided an important state question in a way in conflict with applicable state law.

STATUTES INVOLVED.

Indiana Acts 1945, Chapter 304, Section 70, Volume II, page 1308, *Burns Indiana Statutes Annotated* (1952 Replacement) Section 47-2904, Volume 8 (Part 2), page 1286, reads as follows:

> "47-2904. *Minor, permitting to drive without license unlawful.*—It shall be unlawful for any person having any vehicle in his custody to cause or knowingly permit any minor under the age of eighteen (18) years to drive such motor vehicle upon the public highways unless such minor shall have first obtained a license or permit as provided in this act."

QUESTIONS PRESENTED.

1. Whether an automobile liability insurance policy which excludes from coverage "liability assumed by the named insured under any contract or agreement" provides coverage to the named insured thereunder, with respect to liability incurred by the named insured solely by reason of his having signed a minor's drivers license application, under the terms of which and by reason of the statutory provisions applicable, he thereby agreed to be responsible for injury or damage caused by such minor to another in connection with the use by such minor of an automobile not described in the policy as an automobile covered by the policy and an automobile neither owned, maintained nor being used by or for the benefit of the named insured.

2. Whether the Court of Appeals decision is in conflict with any decision of another Court of Appeals, or the law of the State of Indiana, with respect to the above question pertaining to the law of the State of Indiana.

STATEMENT OF THE CASE.

Petitioner admitted the allegation of respondent that at the time of the automobile collision involved in the *Weigle* case, neither the named insured Robert Bell himself, nor any person for his use or benefit, drove, maintained, used or owned the automobile involved in the collision referred to, nor did the wife of Robert Bell drive, operate, own, maintain or use the automobile involved in said collision, and that the automobile involved in the collision was an automobile not described and different from the automobile described in the insurance policy involved, and that, in fact, neither of Robert Bell or his wife, nor Joseph Bell had any connection, understanding or arrangement whatsoever among themselves concerning the operation or use of the automobile at any time. (Rec. pp. 10-11, 16-17, 49.)

Said insurance policy under Exclusion Rights reads in part as follows:

> "THIS POLICY DOES NOT APPLY: * * * (b) under Coverages A, B and C to liability assumed by the insured under any contract or agreement * * *." (Rec. p. 15.)

ARGUMENT.

Petitioner asserts that the Court of Appeals holds that a named insured who signs an application for a minor's drivers license under a statute like *Burns Indiana Statutes Annotated* (1952 Replacement) Section 47-2706, is thereby assuming a liability that sounds in contract or is within the purview of the "contract or agreement" exclusionary language of an automobile liability policy. (Pet. p. 11.)

Actually, the Court of Appeals holds that the defendant in signing such application *agreed* to assume liability for injuries—not that the assumption sounds in contract—and that the policy excluded coverage or liability thus assumed by agreement. (Pet. p. 28.)

The Court of Appeals did not base its decision upon whether or not the liability of the named insured sounded in tort or contract, but solely upon the premise that the named insured had voluntarily agreed to be responsible for injury caused by another, and such voluntary agreement constituted the type of agreement with respect to which any liability was excluded under the terms of the policy.

The petitioner asserts that the Court of Appeals disclosed a misapprehension of the issues posed by the record in stating that Joseph Bell is not a person included in Insuring Agreement V B. (Pet. p. 11.) It is apparent from the opinion of the Court of Appeals (Pet. p. 28) that the court was discussing whether or not Clause V of the policy should be considered as extending coverage under the circumstances of this case, with respect to injury, occasioned by the use by Joseph Bell, a stranger to the policy, of an automobile strange to the policy, and not

whether or not Joseph Bell was or was not to be considered himself entitled to protection as an insured under the policy. The court holds that Clause V is limited by its subsection pertaining to the unqualified word "insured" (that the scope of Clause V should be construed as consistent with such limitation) and, therefore, the court's conclusion is not to be affected—or policy coverage is not to be extended to the strange automobile used by and for the benefit of a person strange to the policy—by Clause V. (Pet. p. 28.)

The court does not base its opinion on whether or not Joseph Bell is or is not an insured person, but it does say that he is not a person included in the insuring Agreement V. It is apparent that the court in its opinion means that Clause V covers as an insured risk with respect to the use of automobiles not described in the policy, the named insured or his spouse, and persons responsible for the use of the non-described automobile by the named insured or his spouse, and that Joseph Bell is not included in the language of Clause V as a person *whose use* of the non-described automobile involves a risk, as distinct from a risk involving a use by or for the benefit of the named insured, covered by the policy in that the liability imposed upon the named insured by the drivers license statute does not arise by reason of the use of a non-described automobile by or for the benefit of the named insured, or a person responsible for the use by or for the benefit of the named insured. That Joseph Bell's use of the non-described automobile is not the use of a non-described automobile with respect to which coverage is granted under Clause V of the policy to anyone, including the named insured, is the fact with which the Court of Appeals was concerned in stating that Joseph Bell is not a person included in Insuring Agreement V.

Based upon the foregoing erroneous assumption that the

Court of Appeals ignored Clause V of the policy, rather than having determined that Clause V of the policy provided no coverage, the petitioner then asserts that the Court of Appeals contravenes Indiana authority represented by statute, *Burns Indiana Statutes Annotated* (1952 Replacement) Section 39-4309, as construed by the Indiana courts to the effect that the Indiana automobile liability policy is required to provide coverage to the named insured for liability resulting from the operation of the described automobile by the named insured, or by any other person legally using the automobile with the permission of the named insured. Actually, the cases of *Culley* v. *Farm Bureau Mutual Insurance Co. of Indiana* (1946), 224 Ind. 483, 69 N. E. (2) 19, and *Shadow* v. *Standard Accident Insurance Company* (1942), 111 Ind. App. 19, 39 N. E. (2) 493, cited by petitioner (Pet. p. 16) though they suggested that the statute referred to requires only that the insurance policy protects the named insured with respect to the liability of the named insured arising out of the use of the automobile actually described in the policy, these cases, as well as the case of *Shedd* v. *Automobile Insurance Company of Hartford* (1935), 208 Ind. 621, 196 N. E. 227, disclose that the Indiana Supreme Court recognizes the validity of a policy exclusion which would deny coverage to the named insured, even for liability arising from the use of the automobile described in the policy. In each of the cases of *Culley* v. *Farm Bureau Mutual Insurance Co. of Indiana* (1946), 224 Ind. 483, and *Shedd* v. *Automobile Insurance Company of Hartford* (1935), 208 Ind. 621, the Indiana Supreme Court recognized and respected an automobile liability policy exclusion that denied coverage to the named insured for liability arising from the use of the described automobile by a minor, wherein the minor's use violated the exclusionary provisions of the policy. Thus, the holding of the Court of Appeals recognizing the

effect of the exclusionary language of the policy involved in the case at bar, in accordance with the express terms of the exclusionary language is consistent with the holdings of the Indiana Supreme Court pertaining to the Indiana Insurance Code, *Burns Indiana Statutes, Annotated* (1952 Replacement), Section 39-4309. It should be noted, however, that it is not necessary to determine whether or not the exclusionary language should be considered sufficient to render the statute (*Burns Indiana Statutes Annotated* (1952 Replacement), Section 39-4309) inapplicable, inasmuch as the statute pertains only to coverage that should be afforded the named insured, with respect to the use of the automobile described in the policy, and not to coverage with respect to the use of a strange automobile.

Petitioner asserts that the holding of the Court of Appeals is inconsistent with the holding of other courts to the effect that a named insured under an automobile liability policy who signed an application for a minor's driver's license under a statute like *Burns Indiana Statutes, Annotated* (1952 Replacement), Section 47-2706, is thereby assuming a liability that sounds in tort, (Pet. p. 18) and petitioner asserts that the holding of the Court of Appeals is inconsistent with the granting of coverage to the named insured for liability incurred as a result of bailment agreement covering the described policy. (Pet. p. 17.)

It is submitted that neither of these assertions are supported by the authorities cited and considered by the District Court as outlined in its opinion (Appendix A hereof) and by the Court of Appeals as outlined in petitioner's and respondent's briefs which are available to this court, with the respective appendices thereof. It is submitted further that the question involved in determining the rights of the parties under the insurance contract involved constitutes a question of pure state law, governed

by the law of Indiana with respect to which both the District Court and the Court of Appeals considered the application of the Indiana authorities cited as compared with authorities cited from other states. Reference to the opinion of the District Court included as Appendix A of this brief will make it obvious that the District Court carefully considered the application of the Indiana law to the circumstances involved in this action, and it is apparent that the judgment of the District Court affirmed by the Court of Appeals is not clearly in contravention of any principle of Indiana law, but on the contrary, represents a well considered attempt of the District Court, as well as the Court of Appeals, to comply with the Indiana law applicable to the construction of the automobile liability policy. Under these circumstances, and in the absence of the citation of any clearcut Indiana authority contravening the determination of the Court of Appeals, there is no basis upon which this court under its Rule 19 (b) will grant a writ of certiorari.

Petitioner asserts that the holding of the Court of Appeals conflicts with the decision of another court of appeals, and apparently refers to the case of *Preferred Accident and Insurance Company of New York* v. *Onali* (1942 C. C. 8), 125 Fed. (2) 580, in support of this contention. It should be noted that in the case cited, the 8th Circuit Court of Appeals was concerned with whether or not the assumption by the named insured of medical bills resulted in a violation of the exclusionary language of the automobile policy excluding coverage for liability assumed by agreement, wherein as the court stated, the assumption of medical bill liability is itself specifically provided for in the automobile liability policy by language similar to that appearing in Paragraph 16 of the section of the policy involved in the case at bar entitled "Conditions" quoted in the opinion of the Court of Appeals. (Pet. p. 25.) The

Eighth Circuit Court of Appeals in the cited case merely holds that the assumption by the named insured of medical bills at his own cost, as specifically provided for in the policy does not constitute a breach of the general policy exclusion against assumption by agreement of liability for the accident itself. It was not the liability for the accident with respect to which the Eighth Circuit Court of Appeals was concerned, but liability for medical bills only, and it should be noted that the liability assumed for the medical bills under the terms of the policy is itself liability assumed at the sole cost of the named insured and not at the expense of the insuror, or under coverage granted by the policy.

It is apparent that the case at bar involves solely a question of construing a contract of insurance with respect to which the law of the state (Indiana) applies (*Rosenthal* v. *New York Life Insurance Company* (1938), 304 U. S. 263, 58 S. Ct. 872, 82 Law Ed. 1330). This court in *Ruhlin* v. *New York Life Insurance Company* (1938), 304 U. S. 202 at 206, 58 S. Ct. 860, 82 Law Ed. 1290, at 1292, expresaly held that in such instance in which the question of construing an insurance policy which is a question of state law is involved, an alleged conflict of viewpoint among the Federal Circuit Courts of Appeals is not itself a reason for granting the writ of certiorari because the conflict, if any, may be corollary to a permissible difference of opinion among the state courts. As a matter of fact, in this same case of *Ruhlin* v. *New York Life Insurance Company*, after the Court determination of the proper construction of the insurance policy under the applicable state law ((1939 CCA3), 106 Fed. (2) 921), denied certiorari (1939) 309 U. S. 655, 60 S. Ct. 469, 84 Law Ed. 1005).

It is submitted that the records in this case, together with the opinions of the District Court and the Court of Appeals, discloses that the courts below carefully analyzed

the applicable state law of Indiana and applied it to the insurance contract and the circumstances existing and, therefore, regardless of any asserted difference of viewpoint (though respondent denies that any difference is disclosed by any indistinguishable authorities cited by petitioner) among courts of other states or federal circuits, this court will give great weight to the District Court's view of the state law of the state in which it sits. (*Gardner* v. *New Jersey* (1947), 329 U. S. 565 at 575, 91 Law Ed. 504 at 515; *Hillsborough* v. *Cromwell* (1945), 326 U. S. 620 at 630, 90 Law Ed. 358 at 366).

This court has stated that it will ordinarily accept and will, therefore, not review save in exceptional cases the considered determination of questions of state law by the intermediate federal appellate courts (*Huddleston* v. *Dwyer* (1944), 322 U. S. 232 at 237, 88 Law Ed. 1246 at 1249).

CONCLUSION.

It is submitted that the record discloses:

(a) Both the District Court and the Court of Appeals have given careful consideration and have resorted to discerning analysis of the out-of-state and other federal circuit court, as well as the applicable Indiana authorities, in determining a purely Indiana local contract construction controversy.

(b) There have been no authorities cited from other federal circuits which are indistinguishable and in conflict with the judgment under review.

(c) Conflict, if any existed with other federal circuits, is not a reason for granting certiorari in the case at bar, which is concerned only with a question of Indiana law.

(d) No Indiana authority is cited which is indistinguishable and in conflict with the judgment under review, and

this court will give great weight to the lower court's determination of the applicable Indiana legal principle and will accept the lower court's construction, save in an exceptional case of obvious error.

For the foregoing reasons, respondent contends that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

THE OPINION OF THE DISTRICT COURT.

"This is an action brought pursuant to Title 28, U. S. C. Section 2201, in which plaintiff seeks a declaratory judgment to the effect that an automobile liability insurance policy issued by plaintiff to one Robert E. Bell does not cover nor obligate plaintiff to defend either Robert E. Bell as one of the defendants, or any of the other defendants in another action now pending in this court referred to herein as the 'liability case' in which the plaintiffs in the liability case seek to recover damages for injuries allegedly suffered in an automobile accident which occurred on April 17, 1955, in the State of Pennsylvania.

The defendants, who are plaintiffs in the liability case together with Robert E. Bell, who is a defendant in the liability case, have filed a motion for summary judgment seeking a judgment to the effect that the insurance policy involved herein and hereinafter called the policy, obligates the plaintiff to defend Robert E. Bell, the named insured in the policy, as a defendant in said liability case. The plaintiff herein has filed a cross-motion for summary judgment seeking a judgment declaring that there is no coverage under said policy that would obligate plaintiff to defend or indemnify or respond in damages to any of the defendants in this action including Robert E. Bell with respect to the automobile and the automobile accident involved in said liability case.

It appears from the pleadings, affidavits, the motions and admissions of the parties herein incorporated in memoranda filed and stated in argument made herein that there are no genuine issues of fact with respect to the following

facts relevant to a determination of the issues of law submitted by the pleadings and said cross-motions for summary judgment.

At the time of the accident involved, Joseph Bell, deceased, a minor, was driving the automobile involved and is alleged in the liability case to have injured the plaintiffs therein by his negligent driving.

The plaintiff herein at the time of the accident had issued as insuror, and there was in effect, the policy to Robert E. Bell, of Terre Haute, Indiana, who was the only named insured in the policy, a copy of which policy is filed as Exhibit A of plaintiff's complaint.

The plaintiffs in the liability case charge Robert E. Bell as a defendant therein with having 'signed Joseph Bell's application for an Indiana Motor Vehicle Operator's License, and in so doing the defendant Robert E. Bell made a written undertaking as a part of said application wherein the defendant Robert E. Bell agreed to be responsible, jointly and severally with the said Joseph Bell, for any injury or damage which Joseph Bell might cause by reason of Joseph Bell's operation of a motor vehicle in all cases where Joseph Bell is liable in damages'.

The automobile which Joseph Bell was driving at the time of the accident involved was not the automobile described in the declaration in the policy of insurance issued by plaintiff herein, nor was the automobile driven by Joseph Bell owned by either of Joseph Bell, Robert Bell, or Robert Bell's spouse, if any.

Joseph Bell is alleged in the liability case at the time of the accident with having driven the automobile involved as the agent and servant of the persons Leo Light and Roy C. Hodge, doing business as the National Literary Association and as the agent and servant of the said James N. Lonigan and James C. Cochran.

There was no communication or understanding between Joseph Bell and Robert Bell or his spouse with respect to the automobile involved in the collision and neither Robert Bell, the named insured nor his spouse, nor anyone else for Robert Bell's benefit drove, maintained, used or owned the automobile involved in the accident, nor did Robert Bell or his spouse exercise any control over Joseph Bell in the operation of the automobile involved, nor did Robert Bell or his spouse occupy the automobile involved at the time of the accident, nor did Joseph Bell operate the automobile for the benefit of Robert Bell or his spouse at the time of the accident.

Inasmuch as the automobile involved in the accident was neither the automobile described in the policy nor was it being driven with the permission or consent of the named insured, it is apparent under the terms of the policy, without the citation of authority, that no coverage is extended under the policy to Joseph Bell or Ralph E. Brill, Administrator of the Estate of Joseph Bell, deceased, nor was Joseph Bell an 'insured' under the policy, nor do the defendants herein contend that Joseph Bell was an insured. It, therefore, remains only to determine whether or not the policy provides coverage under which plaintiff as insurer should be forced to defend and indemnify the named insured Robert Bell for the liability, if any, that Robert Bell may have incurred by reason of Joseph Bell's having negligently injured the plaintiffs in the liability case, because of Robert Bell's having 'signed Joseph Bell's application for an Indiana Motor Vehicle Operator's License and in so doing' having 'made a written undertaking as a part of said application wherein' he 'agreed to be responsible jointly and severally with the said Joseph Bell.'

The policy as well as the Indiana Statute prescribing the provisions required in automobile liability policies

(Burns Indiana Stat. Ann. 1952 Replacement, Sec. 39-4309) provided for insuring the owner (the named insured Robert Bell) against liability for damages, for injury to person or property resulting from negligence in the operation of the automobile described in the policy in the business of the owner or otherwise by any person legally using the automobile with the permission and consent of the named insured as the owner thereof.

The defendants herein rely upon the clause of the policy entitled 'Use of Other Automobiles', which provides in part as follows:

> 'V. Use of Other Automobiles. If the named insured is an individual who owns the automobile classified as "pleasure and business", or husband and wife, either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile, applies with respect to any other automobile, subject to the following provisions:
>
> "(a) With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes (1) such named insured, (2) the spouse of such individual if a resident of the same household, and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization."

Insuring Agreement III, 'Definition of Insured' does not apply to this insurance.

> '(b) This insuring agreement does not apply:
>
> "(1) To any automobile owned by, hired as a part of a frequent use of hired automobile by or furnished for a regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;
>
> (2) To any automobile while used in the business

or occupation of the named insured or spouse, except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant; * * *"

The defendants contend in their motion for summary judgment that inasmuch as the policy thus covers the named insured, Robert E. Bell, with respect to 'any other automobiles' there is clearcut coverage in this case, because Robert E. Bell is or might be liable, by reason of signing Joseph Bell's driver's license application, for damages to the plaintiffs in the liability case, for personal injury and death suffered because of the negligent use or operation by Joseph Bell of any other automobile.

Plaintiff contends that the policy which, except for Clause V quoted above, covers only with respect to the use of the automobile described in the policy which was not involved in the accident, cannot be reasonably considered under the provisions of Clause V quoted above to extend coverage for liability, if any, assumed by Robert E. Bell collaterally to, and divorced from, Robert Bell's use of any automobile with respect to the use of an automobile foreign to the policy by a person not contemplated as an insured under the policy, and with respect to use over which neither Robert Bell nor his spouse has any control, and with respect to use which was for the benefit of persons who were not insureds under the policy and not for the benefit of Robert Bell or his spouse.

Plaintiff further contends that such liability, if any, as Robert E. Bell may have assumed by signing Joseph Bell's application for a driver's license, with respect to the use of the accident automobile by Joseph Bell, was 'liability assumed by the insured under any contract or agreement' for which the policy in the clauses concerned with exclusions expressly excluded from coverage.

If Clause V of the policy quoted above does not extend coverage to the named insured Robert E. Bell for liability of Robert E. Bell arising out of the use of an automobile not described in the policy, and not used by or for Robert Bell's benefit, there is no coverage and plaintiff should prevail. The parties herein state that they have failed to find any Indiana cases in which this 'use of other automobiles' clause in the standard automobile policy is construed, and the court's research has failed to disclose any such Indiana cases.

The court recognizes the broad general principal applicable to the construction of insurance policies to the effect that inasmuch as the policy is prepared by the insuror, any ambiguity should be construed against the insuror, but the court also recognizes the principle of construction to the effect that it is the true intention of the parties that is sought in construing written contracts, including insurance policies and, therefore, a reasonable as contrasted with a strained, extreme, or unreasonable construction of the language used should be adopted. Such cases as have been cited to illustrate the general intent and purpose of the 'use of other automobiles' clause, involved situations in which the accident automobile was actually used or occupied by the name insured.

> *Rodenkirk* v. *State Farm Mutual Auto Insurance Co.* (1945) 325 Ill. App. 421, 60 N. E. (2) 269;
>
> *Campbell* v. *Aetna Casualty & Surety Company* (1945 CA 4) 211 Fed. (2) 732, and the Notation in 173 A. L. R. 901.

The court, in the case of *Campbell* v. *Aetna Casualty & Surety Company*, supra, 211 Fed. (2) 732 at p. 736, concerning the purpose of this and 'use of other automobiles'

clauses similar to that involved in the policy herein, stated as follows:

> 'The great weight of authority is in accord with the interpretation of this provision by Judge Chestnut in *Alter* v. *Travelers Indemnity Co.*, D. C. Md., 92 F. Supp. 620, 623, where he said:
>
> > "This case involves the construction and application of the so-called 'drive other automobiles' clause of the present standard automobile liability policy. The general purpose and effect of this provision of the policy is to give coverage to the insured while engaged in the only infrequent or merely casual use of an automobile other than the one described in the policy, but not to cover him against personal liability with respect to his use of another automobile which he frequently uses or has the opportunity to do so. More specifically the evident intention of the limitation with respect to other automobiles is to prevent a situation in which the members of one family or household may have two or more automobiles actually or potentially used interchangeably but with only one particular automobile insured. That this is the general purpose of the provision is well and clearly stated in the annotation on the subject in 173 A.L.R. 901. And see *Lumbermens Mutual Cas. Co.* v. *Pulsifer* D. C. Me. 41 F. Supp. 249; *Rodenkirk* v. *State Farm Mut. Auto Ins. Co.* 325 Ill. App. 421, 60 N. E. 269".
>
> 'See also *Farm Bureau Mut. Auto Ins. Co.* v. *Boecher*, Ohio App. 48 N. E. 2d 895; *Island* v. *Firemen's Fund* Ind. Co. 30 Cal. 2d 541, 184 P. 2d 153, 173 A. L. R. 896; *Northwest Cas. Co.* v. *Legg*, 91 Cal. App. 2d 19, 204 P. 2d 106' *Vern* v. *Merchants Mut. Cas. Co. Sup.*, 118 N. Y. S. 2d 672; *Fleckenstein* v. *Citizens' Mutual Automobile Ins. Co.*, 326 Mich. 591, 40 N. W. 2d 733; cf. *Travelers Indemnity Co.* v. *Pray*, 6 Cir., 204 F. 2d 821.'

It is difficult to see how the 'use of other automobiles' clause can be said to extend the coverage to the named

insured for liability assumed for the use of a non-described automobile by a person who is not an insured, when the 'use of other automobiles' clause does not extend coverage, even to the named insured for the use by the named insured of an automobile not described in the policy, even though the automobile used might be owned by the named insured or a member of his household. It should be noted that sub-paragraph (a) of Clause V cited above, with respect to other automobiles extends coverage for the benefit of the named insured and his spouse and '(3) any other person * * * legally responsible for the use by said insured or spouse, of an automobile not owned by such other person'. It seems apparent from this extension of the definition of an insured under the 'use of other automobiles' clause only to those persons other than the named insured and his spouse who are legally responsible for the use by the named insured or by his spouse, of the other automobile, that the policy intends in Clause V to provide for extended coverage only for the use by the named insured or his spouse of such other automobile. The use of the other automobile by the named insured or his spouse, of course, could involve liability, not only on the part of the named insured or his spouse as users, but liability of either of them while the automobile was used by the other for his or her benefit, or liability of other persons for whom the named insured or his spouse uses the other automobile.

It should also be noted that sub-paragraph (b)(1) of Clause V quoted above excludes coverage even to the named insured for his own use if he regularly uses the automobile whether or not he owns the same, as pointed out in the cases cited above, and then in Clause (b)(2) there is the further precautionary language to the effect that if the use of the other automobile is a business use (for which the named insured would be responsible under the principal-agency rules) the automobile must actually be operated or at least occupied by the named insured, his spouse, chauf-

feur or servant. This precautionary language is intended for the obvious purpose of preventing the named insured enjoying the 'fleet' coverage for many automobiles used in his business by procuring a policy with the premium set upon the description of but one automobile in the policy.

If it is said that the named insured by signing another person's drivers license application, extends the coverage of his insurance policy for the regular use of any of an unlimited and undescribed number of automobiles (the sole purpose of a driver's license) by a person not an insured under the policy, it is extending coverage to the named insured for the regular use for which the named insured has voluntarily made himself responsible for purposes presumably in which he is interested and it would seem that the named insured thereby would be extending coverage for the regular use of other automobiles by the named insured or his nominee. This does violence to the intent and spirit of subparagraph (b)(1) of Clause V, as well as ignores the implicit requirement of subparagraph (a) and subparagraph (b)(2) that the named insured directly by operating, or indirectly by occupying the other automobile in order that Clause V extend coverage.

If the named insured by signing a driver's license for anyone, or an unlimited number of persons who are not insureds under the policy, may extend coverage for the use of an unlimited number of automobiles by an unlimited number of persons, it would mean that by Clause V the insuror had given the named insured a "blank check" to extend the coverage without limitation and without regard to the representations, warranties, declarations and exclusions provided for throughout the policy with the obvious purpose of limiting coverage in general to the named insured and his spouse, with respect to a described automobile and those persons who use the described automobile with the permission and consent of the named insured.

The court considers the only reasonable construction of the language used as a matter of law to be that the policy in Clause V extends coverage to the named insured or his spouse, or to any person legally responsible for the acts of the named insured or his spouse, for liability arising out of the casual or infrequent use by the named insured or his spouse, either directly by operating or indirectly by occupying and controlling the use of any other automobile not described in the policy.

It is the court's opinion, therefore, that plaintiff's motion for summary judgment should be sustained and defendant's motion overruled with respect to Count 2 of the complaint, inasmuch as Count 2 is based upon the premise that Clause V of the policy does not extend coverage to liability for the use of an automobile not described in the policy when used by a person who is not an insured contemplated in Clause V or any other provision of the policy.

It is not necessary, however, to base a determination of the rights of the parties under said policy solely upon a construction of the language of the 'use of other automobiles' clause of the policy. As pointed out in Count 1 of the complaint, upon which Count 1 is based, the policy also provides in part as follows: 'This policy does not apply: • • • (b) under coverages A, B, C, to liability assumed by the insured under any contract or agreement; • • •'

The liability, if any of Robert Bell arising from the use of automobile by Joseph Bell does not arise as an incident only of any relationship between Robert Bell and either of Joseph Bell or the automobile involved. It cannot be said, for instance, that the liability of Robert Bell arises because of a master-servant relationship of which vicarious tort liability is but an incident, nor can it be said that the liability, if any, arises as but an incident of the ownership of the automobile involved.

The fact that a bailor is liable for the negligence of his bailee because of the bailment as such in some states (such as California; (See *Norris* v. *Pacific Indemnity Company* (1951 California), 237 Pac. 66.), and the bailor is not liable as such in Indiana (*Fisher* v. *Fletcher* (1922), 191 Ind. 529, 135 N. E. 834), may affect the construction of an insurance policy that seeks to exclude coverage of a named insured's liability as bailor does not concern the court in this case, for Robert Bell was neither the owner nor the bailor of the automobile driven by Joseph Bell.

The fact that the bailor in Indiana may be liable for the independent act of negligence of entrusting his automobile to a bailee known to be an incompetent driver (*Reprzinski* v. *Mikulak* (1927), 93 Ind. App. 491, 157 N. E. 464) or that a father may be liable for negligence *per se* in violating the Indiana statute (Burns Ind. St. Ann. 1952 Replacement, Sec. 47-2904), which prohibits knowingly entrusting an automobile to an unlicensed minor under eighteen years of age (*Smith* v. *Thomas* (1955 Ind. App.), 130 N. E. 2d 85), does not concern the court in construing this policy, for Robert Bell is not alleged to have entrusted an automobile of his to an unlicensed minor or an incompetent driver.

The 'family purpose' doctrine has no application in Indiana, and the permission of the automobile owner alone is not enough to cause the liability of a negligent driver to be imputed to the non-driving owner. The bailee's use of the automobile in order that his negligence be imputed to the bailor in Indiana, must at least be for the benefit of or subject to the control of the non-driving owner (*Harper* v. *Puckett* (1952), 122 Ind. App. 528, 106 N. E. 2d 116; *Cates* v. *Long* (1947), 117 Ind. App. 444, 72 N. E. 2d 233. In any event the automobile used by Joseph Bell was not owned by Robert Bell nor was it used with Robert Bell's

permission or for Robert Bell's benefit, or subject to Robbert Bell's control, either directly or indirectly.

Under the terms of the policy which expressly makes its construction conform with the laws of the State of Indiana, under which it was issued, and under the laws of Indiana thus applicable, the liability, if any, of Robert Bell is incurred and the coverage of Robert Bell under the policy with respect to a non-described automobile, would be extended by the 'use of other automobiles' clause, if at all, only by reason of Robert Bell's having signed Joseph Bell's application for driver's license. Robert Bell is alleged to have agreed to be responsible with Joseph Bell by written undertaking in signing Joseph Bell's driver's license application prepared and executed pursuant to the Indiana Statute (Burns Ind. St. Ann. 1952 Replacement, Sec. 47-2706), which, after providing that the minor's drivers license application must be signed by a parent, guardian, custodian, employer, or anyone who is willing to assume the obligations imposed upon the signer by the statute, then provides in part as follows: '(d) any person so signing such application as above provided, thereby agrees to be responsible jointly and severally with such applicant, for any injury or damage which such applicant may cause by reason of the operation of a motor vehicle, in all cases where the applicant is liable in damages.'

Does the execution of the written undertaking as a part of the driver's license application under this statute constitute an assumption of liability by agreement as contemplated by the policy?

In the words of the statute the person signing 'thereby agrees to be responsible' and the 'agreement' is not an incident of any collateral relationship of the parties, but the assumption of liability alone is the fundamental and sole essence of the transaction of signing the driver's license.

The court's judgment could well depend upon the clear-cut language of the policy as well as the statute thus summarized, but the defendants strongly urge that the California court has determined that assumption of liability by signing a minor's driver's license application under the California statute does not constitute assumption of liability by agreement or contract as contemplated under the standard automobile policy such as is involved in this case. The defendants cite the cases of *Lackey* v. *Olds and Stroller Inter Exchange* (1927), 80 Cal. App. 687, 252 Pac. 672, and *Marple* v. *American Automobile Insurance Company* (1927), 82 Cal. App. 137, 255 Pac. 260.

In California, however, the statute with which the California court was concerned is different from the Indiana Statute in that the California statute, instead of being written in terms of agreement, is written in terms of imputing the minor's negligence or superimposing the minor's tort upon the driver's license signer. As stated in *McFarland* v. *Cordiero* (1929), 99 Cal. App. 352, 278 Pac. 889, at 890, the California statute provides that 'the application is signed by * * * the parent * * * having custody of such minor. * * * Any negligence of a minor so licensed in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for such license, which person or persons shall be jointly and severally liable with such minor for any damage caused by such negligence.' In both of the California cases of *Lackey* v. *Olds and Stroller Inter Exchange, supra* and *Marple* v. *American Automobile Insurance Co., supra,* the minor driving the automobile was driving the automobile with the permission and consent of the owner, and the automobile was owned by the person who signed the driver's license application, and the automobile was the automobile described in the insurance policy involved.

In California (different from Indiana) a bailor is liable for the negligent acts of his bailee within the scope of the bailment (*Norris* v. *Pacific Indemnity Company* (1951 Cal.), 237 Pac. 66) and a provision in an insurance policy purporting to exclude coverage when the car is being driven by a minor younger than sixteen years of age, will not be permitted by the court to exclude coverage wherein the named insured signed the minor's driver's license and the minor was driving the automobile described in the policy, and the policy expressly covered the owner's liability for the use of the described automobile while being driven with permission of the owner. (*Firkin* v. *Zurick General Accident & Liability Company* (1931), Ill. Cal. App. 655, 295 Pac. 1051.)

On the contrary, in Indiana, even though there is statutory liability imposed upon a parent for the negligent injury caused by a minor in permitting an unlicensed minor to operate an automobile (*Smith* v. *Thomas* (1955 Ind. App.), 130 N. E. 2d 85), the Indiana automobile policy, pursuant to its terms and pursuant to the Indiana statute (Burns Ind. St. Ann. 1952 Replacement, Sec. 39-4309; *Spickelmeier* v. *T. H. Mastin Co.* (1939), 107 Ind. App. 350, 24 N. E. 2d 797) is required to and does cover the owner's liability for the use of the automobile described in the policy, nevertheless, in an instance in which the owner of the automobile and the named insured permits an unlicensed minor to operate the described automobile, for which the owner and the named insured is liable, either under the statute or upon principal-agency relationship, the Indiana court holds that an exclusion of coverage for illegal driving by a minor will deny coverage to the owner. See *Culley* v. *Farm Bureau Mutual Insurance Company* (1946), 224 Ind. 483, 69 N. E. 2d 19.

As a matter of fact all of the cases cited by the defendants, in which the driver's license signing statute is in-

volved, represent cases in which the courts have had a statute that 'imputed' the negligence of the minor to the license signer and the courts have held that the liability by reason of the negligence imputed was incurred by the signer as a direct liability (rather than secondary) to the injured party. The liability to the injured party assumed by the signer under the 'imputed' negligence statutes is held by the courts to be liability in tort for negligence as contrasted with 'statutory liability' imposed by the statute.

Hickman v. *Tullos* (1954 M. D. Ala.), 121 Fed. Supp. 152.

McFarland v. *Cordiero* (1929), 99 Cal. App. 352, 278 Pac. 889.

Robinson v. *Hardway* (1943 Ky.), 169 S. W. 2d 823.

Whether the liability of the insured is itself considered *ex contractu* as compared with tort is immaterial in determining whether the insured has assumed the liability itself by agreement under the exclusion provisions of the policy.

St. Louis Police Relief v. *Aetna Casualty & Surety Company* (1941 Mo.), 154 S. W. 2d 782; (Contractual liability).

Western Casualty & Surety Company v. *Weimar* (1939 C. C. A. 9), 96 Fed. 2d 635.

Kindervater v. *Motorists Casualty Insurance Co.* (1938 N. J.), 199 Atl. 606 (tort liability).

The California court holds that the tort liability of the driver's license application signer imputed by the statute to the signer is assumed by the signer by the act of signing the application, and cites

(*McFarland* v. *Cordiero* (1929), 99 Cal. App. 352, 278 Pac. 889)

and the California court points out that such assumption is by contract in *Broome* v. *Kern Valley Packing Co.* (1935), 6 Cal App. 2d 256, 44 Pac. 2d 430, at page 433, wherein the court states 'Where a parent signs a minor's application for a license he becomes jointly and severally liable and a failure to find against the minor in such a case does not release the parent from the direct liability he has *assumed by his contract.* (Our emphasis.)'

This is, of course, consistent with the theory of the Alabama Federal Court in *Hickman* v. *Tullos, supra,* wherein the Alabama Federal Court points out that by signing the driver's license application the signer agrees to be liable, even though the liability assumed is then determined to sound in tort.

Though the California court concedes, as above pointed out, that the driver's license signer's liability is assumed by contract (whether the contract be by unilateral agreement or whether it be considered bilateral with the state or the minor for the benefit of the public, is immaterial), the California court in the cases of *Lackey* v. *Olds and Stroller Inter Exchange, supra,* and *Marple* v. *American Automobile Insurance Co., supra,* does not consider that such an assumption constitutes a breach of the policy sufficient to permit the insuror to deny coverage to the named insured for use of the policy described automobile which is owned by the named insured and being driven with permission and consent of the named insured by a minor whose driver's license application the named insured also signed. It should be noted that the owner's liability in California could be predicated as well upon the bailment law of California as upon the driver's license statute.

In any event, as indicated in the case of *Culley* v. *Farm Bureau Mutual Insurance Co., supra,* the Indiana court on the contrary, recognizes the efficacy of the policy exclusion to deny coverage to the automobile owner for the statu-

tory liability incurred by reason of entrusting the described automobile to an unlicensed minor, even though the court also had involved a minor driver who was the agent of the named insured owner.

If there were any doubt concerning the difference in the viewpoint of the Indiana court from that of the California court, with respect to the obligation of the insuror to extend the coverage to the named insured for liability incurred by reason of the use of a non-described automobile by one who is not an insured under the terms of the policy, an examination of the case of *Culley* v. *Farm Bureau Mutual Insurance Co., supra,* in connection with the Indiana court's analysis of the law of New York, which is similar to that of California, in the case of *Shadow* v. *Standard Accident Insurance Company* (1942) 111 Ind. App. 19, 39 N. E. 2d, 493, would dispel any such doubt. In the *Shadow* case, the Indiana court in explaining the broad contest of the language of the New York Court used in certain opinions cited, pointed out that the New York bailor-bailee liability law was different from the Indiana non-liability concept and that it was the owner's liability as bailor with which the New York Court was concerned in making statements to the effect that an insuror could not deny liability for injury caused by the use of a described automobile by a minor driver. It is the owner's liability that the Indiana court requires the insuror to indemnify and yet, even though the Indiana court recognizes the owner's liability for the use of an automobile entrusted to an unlicensed minor driver, or an agent, the Indiana court in the *Culley* case grants full effect to the policy exclusion denying coverage should the automobile be entrusted to a minor and liability incurred by the owner in a manner prohibited by the policy.

It is the court's opinion that the policy in the case at bar, when construed in connection with the Indiana law,

which differs substantially from that of California, excludes coverage for the liability assumed by Robert Bell as the named insured, if any, by reason of his having signed Joseph Bell's driver's license application and 'thereby agreeing to be responsible' for the negligence of Joseph Bell. Under the circumstances, therefore, the plaintiff's motion for summary judgment with respect to Count 1 of the complaint should be sustained and the motion of the defendants should be overruled.

It should be noted that reference to possible liability of Robert Bell for the acts of Joseph Bell under the circumstances involved in this case is not intended by the court to indicate any opinion of the court, either in the affirmative or the negative, as to whether or not there is any liability in fact or in law on the part of Robert Bell, with respect to the accident involved by reason of his having signed the driver's license application involved.

The defendants' motion for summary judgment in all respects shall, therefore, be overruled and the plaintiff's motion for summary judgment will be sustained with respect to both of Count 1 and Count 2 of the complaint, and judgment in accordance with the prayer of the complaint and in conformity with this opinion should be submitted by plaintiff's counsel.

Dated and filed this 1st day of April, 1957."